modify its Order in MCI WorldCom in light of the FCC's Internet Traffic Order. Bell Atlantic's Motion for Modification, at 10, states that ISP-bound traffic "is now, and always has been, interstate traffic . . . , and CLECs have received substantial compensation to which they are not entitled under those [i.e., their respective interconnection] agreements."

In MCI WorldCom, the Department construed the 1996 Act as conferring jurisdiction upon it to hear MCI WorldCom's complaint about interpretation of its interconnection agreement with Bell Atlantic. MCI WorldCom, D.T.E. 97-116, at 5. In exercising this jurisdiction, the Department found "that a call from a Bell Atlantic[-Massachusetts] customer that is terminated by MCI WorldCom to an ISP is a 'local call,' for purposes of the definition of local traffic in the Agreement [between Bell Atlantic and MCI WorldCom], and, as such, is eligible for reciprocal compensation." Id., at 5, 12-13. The Department noted that although the parties to the matter had "raised numerous issues," the Department's Order "*need only address* the question of *whether a call terminated* by MCI WorldCom *to an ISP is local*, thus qualifying it for reciprocal compensation under MCI WorldCom's interconnection agreement with Bell Atlantic." Id., at 6 (emphasis added). The Department's October Order thus confined its enquiry in this matter solely and exclusively to whether the ISP-bound traffic in question was "local" (i.e., intrastate) or interstate calling. This limitation of the basis for the

---

22 (...continued)
The Department did, however, note the implications of its Order for other interconnection agreements. MCI WorldCom, D.T.E. 97-116, at 14. The contract in question was the "Interconnection Agreement between New England Telephone and Telegraph Company and MFS Intelenet of Massachusetts, Inc." dated 26 June 1996, and filed with the Department on 10 July 1996. Of particular note, are §1.38, the definition of 'Local Traffic', and §5.8, Reciprocal Compensation Arrangements – Section 251(b)(5).

Department's holding was express; and no other basis may be reasonably inferred from the Order. The October Order's effectiveness was thus ransom to the validity of its legal or jurisdictional conclusion.

To repeat, lest it be misunderstood: there was no other basis for the Department's holding in MCI WorldCom, D.T.E. 97-116. If that express legal basis were to prove untenable (as, in the event, it has), the effectiveness of the Order could not hold. And the Department recognized and acknowledged as much. Id., at 5 n. 11 and 6 n. 12.

As it happens, the Department's "two-call" theory cannot be squared with the FCC's "one-call" analysis. In rendering its "two-call" decision on reciprocal compensation for ISP-bound traffic, the Department twice acknowledged that FCC authority over the question may trump or supersede the Department's. Noting that the FCC might exercise its superior jurisdiction in a manner inconsistent with the Department's view of the law, the Department twice observed that, in that event, its own Order might require modification or change. Id. That twice-repeated caution[23] of the risk attendant on proceeding with reciprocal compensation for ISP-bound traffic before the FCC spoke appears to have been discounted or to have gone unheeded, if one is to judge from the numerous filings in response to Bell Atlantic's Motion for Modification. The substance of these filings is rehearsed above and need not be repeated here.

---

[23] The point was noted for a third time in MCI WorldCom Technologies, Inc., D.T.E. 97-116-A, at 2 (1999)

MCI WorldCom also expressed reservation that an enterprise "established solely (or predominately) for the purpose of funneling traffic to an ISP (particularly if that ISP is an affiliate) . . . may jeopardize its regulatory status and entitlements as a local exchange carrier." Id., at 13. The reservation was over the potential for "gaming" the regulatory scheme--with the consequence of siphoning off revenues but achieving no advance in true, efficient competitive entry.[24] This reservation was the subject of a motion for reconsideration by MCI Telecommunications Corporation, addressed by the Department in MCI WorldCom Technologies, Inc., D.T.E. 97-116-A (1999). The significance of the reservation was recognized in Internet Traffic Order, at ¶ 24 n.78.

In its October Order, the Department exercised its authority to resolve the MCI WorldCom complaint. The Department based its Order on the express *and exclusive* premise that "[a] call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet." MCI WorldCom, D.T.E. 97-116, at 11, 12-13. To be sure, the FCC evidenced discomfort in trumping states' authority under Section 251(b)(5) and spoke equivocally about the effects of its declaratory order on decisions already taken by state commissions such as the Department.

---

[24] The matter of efficient entry by providers versus inefficient entry evidently weighs heavily upon the FCC as well. Internet Traffic Order at ¶ 6.

Internet Traffic Order at ¶¶ 27 and 28.[25] Even so, the message for the Department's MCI WorldCom Order cannot be mistaken.

The Department based its October Order on a mistake of law, i.e., on an erroneous characterization of ISP-bound traffic and on a consequently false predicate for concluding that jurisdiction was intrastate. By basing its jurisdictional analysis and finding on a mischaracterization of the nature of ISP-bound traffic, the Department exceeded its grant of state regulatory authority under the 1996 Act. Although the vague and equivocal terms of Paragraph 27 of the FCC's Internet Traffic Order may suggest that *some* state commissions "might conclude" that their reciprocal compensation orders remain viable, the FCC has, to put the matter baldly, rendered the DTE's October Order in MCI WorldCom–as a practical matter–a nullity. *Pace* the FCC's consoling notion that some states' orders might stand on

---

[25] The equivocation is subtle but evident in the word "necessarily" as used in the penultimate sentence of ¶ 27. It did not escape the notice of one FCC commissioner. As he so often politely but cogently does, FCC Commissioner Michael K. Powell points out the essential incoherence of the majority's dicta about state decisions affected by the Internet Traffic Order: "Such reasonableness does little to preserve those state decisions most likely to be disturbed by our 'one call' jurisdictional analysis, namely, decisions based primarily or exclusively on a 'two-call' theory. In short, I think touching on the issue of shared jurisdiction muddles our conclusion that there is federal jurisdiction with respect to these questions." Internet Traffic Order, Concurrence of Commissioner Powell, text at n. 1. There is evident division among the FCC commissioners over the implications of this "shared jurisdiction theory" (to use Commissioner Powell's term). See Separate Statement of Commissioner Susan Ness, fourth paragraph (it "remains reasonable for the states . . . to treat this [ISP-bound] traffic as local"). It may be that the FCC's temporized ("muddled" in Commissioner Powell's terms) jurisdictional analysis is a reaction to the sizeable minority of the Supreme Court, who joined Justice Thomas in expressing dismay at the FCC's earlier incursion into a traditional state province in *AT&T Corp. v. Iowa Utilities Board* (see note 21 *supra*).

state "contractual principles or other legal or equitable[26] considerations," Internet Traffic Order at ¶ 27, our Order stood *squarely, expressly, and exclusively* on a "two call" premise. That foundation has crumbled.[27] There is no alternative or supplemental finding in our October 1998 Order to rely on in mandating continued reciprocal compensation for ISP-bound traffic. In view of the FCC's practical negation of the legal and analytic basis of our October Order, we see no logical alternative to vacating that Order in response to the Motion for Modification. We hereby vacate MCI WorldCom, D.T.E. 97-116.

Unless *and until* some future investigation of a complaint, if one is filed, concerning the instant interconnection agreement determines a different basis for such payments, there presently is no Department order of continuing effect or validity in support of the proposition that such an obligation arises between MCI WorldCom and Bell Atlantic. Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations

---

[26] The FCC's use of the word "equitable" is ambiguous. It is not clear what equitable powers a regulatory agency could, in any event, claim to exercise, as it acts under a statutory grant. The FCC's observation was evidently intended to cushion the jurisdictional blow, but all it does is muddle the message, as Commissioner Powell has observed. Internet Traffic Order, Concurrence of Commissioner Powell, text at n. 1.

[27] The parties to this docket have diligently provided the Department with other states' decisions on reciprocal compensation rendered since Internet Traffic Order was issued. We have reviewed those filings. Other state commissions considered the effects of the FCC's ruling on *their* situations, on the interconnection agreements before them, and on prior decisions rendered. We have before us only *our own* October Order and the interconnection agreement construed by that Order. Useful as it has been to know what other states have made of the FCC's ruling, it is equally useful to recall Commissioner Powell's observation about the effects of that ruling: "Furthermore, having reviewed a number of the state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state." Internet Traffic Order, Concurrence of Commissioner Powell, page 2.

under their interconnection agreement, there is–*post* February 26, 1999–no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.

The consequences may be adverse for enterprises that acted aggressively in reliance on the nullified and now-vacated Department decision in MCI WorldCom's favor (ignoring the Department's express warnings that its decision could be changed by FCC findings). But no amount of wishful thinking can our justify clinging to a vitiated decision; nor can it empower the Department to countermand what the FCC has determined. The attempt of some parties and commenters to base their arguments on the vague terms of Paragraph 27 of Internet Traffic Order is futile. If that paragraph has any effective meaning (a matter open to doubt, given the FCC's reference to its pending rulemaking), then surely it is that only those pre-26 February decisions by state commissions founded, not on a "two call" jurisdictional theory, but rather on state contract law or some "other legal or equitable considerations" *might yet* remain viable–at any rate, "depending on the bases of those decisions" and, of course, "pending the completion of the rulemaking" the FCC initiated. Internet Traffic Order at ¶ 27. It seems patent that the FCC had in mind state decisions already, or yet to be, taken[28]--and that only to the extent such decisions might fit this vague criterion. The Department's October

---

[28] The FCC's wording ("any determination a state commission has made, or may make in the future"), Internet Traffic Order at ¶ 24, must be read in light of the only plausible, saving grounds for such state determinations set out by the FCC in ¶ 27 (state decisions taken, before or after February 26, that rest on "contractual principles or other legal or equitable considerations"). State decisions whose conclusions "are based on a finding that this [ISP-bound] traffic terminates at an ISP server," id., are in another category, however. And our October Order falls into this latter group.

Order was not so based–with the result that, were that Order not vacated, it would float, untethered, in a jurisdictional void. MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts contract law "or other legal or equitable considerations" give rise to mutual obligation on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement.[29]

How useful such a renewal might be is not predictable. We suggest a perhaps more promising course below.

Pending, however, such a renewal of the complaint and ultimate resolution of the matter, Bell Atlantic's Motion for Modification of March 2, 1999 is granted, in that the Department's Order in MCI WorldCom, D.T.E. 97-116, is vacated. Although that Order adjudicated only the Bell Atlantic-MCI WorldCom dispute, it professed to have broader implication (see Section IV of the October Order); and so, the suggested, broader applicability of that Order must, since the issuance of Internet Traffic Order, be doubted. MCI WorldCom, D.T.E. 97-116 at 14. However, Bell Atlantic has acted, since the October Order, on the understanding that our findings in MCI WorldCom applied to all interconnection agreements; and now a corresponding but converse understanding based on the instant Order appears warranted. In fact, as far as reciprocal compensation payments not made to MCI WorldCom

---

[29] We do not, at this point, hazard a judgment whether such an alternative basis exists in the Bell Atlantic-MCI WorldCom interconnection agreement before us. If such a basis can be convincingly shown, then it would not be the Department's role to save contracting parties from later-regretted commercial judgments. See Complaint of A-R Cable Services, Inc., D.T.E. 98-52, at 5 n. 7 (1998).

or other CLECs as of February 26, 1999 are concerned,[30] no currently effective Department order categorically requires Bell Atlantic to pay, in some way, for handling CLECs' ISP-bound traffic. Bell Atlantic has proposed making payments under its interconnection agreements at a ratio not in excess of 2:1(terminating-to-originating traffic).[31] This arrangement is reasonable for the nonce, i.e., until the dispute is settled.

Reciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999. Yet it still appears there were and may still be costs incurred by

---

30 This finding partly addresses RNK's Motion for Clarification. Bell Atlantic's Motion for Modification of our October Order intimates that reciprocal compensation payments made for ISP-bound traffic before February 26, 1999 were never truly due and owing under the interconnection agreement. Bell Atlantic notes that "there is no severable 'local' component of an Internet call but such traffic is now, and *always has been*, interstate traffic. . . . Internet-bound calls are not eligible for 'local' reciprocal compensation under BA-MA's interconnection agreements, and CLECs have received substantial compensation to which they are not entitled under those agreements." Bell Atlantic's Motion for Modification, at 10. Despite Bell Atlantic's intimation, the question of refund is not before us, and so we take no position on the status of payments made by Bell Atlantic for reciprocal compensation for ISP-bound traffic prior to February 26, 1999. To do so now would be premature–assuming that D.T.E. even has jurisdiction over the question of refunds and considering the instructions below as to negotiations, mediation, and, if it must come to that, arbitration. But we shall not require Bell Atlantic to make (i.e., to disburse) any payments that were not made as of that date. See text immediately *infra*.

31 In the current absence of a precise means to separate ISP-bound traffic from other traffic, we believe that Bell Atlantic's 2:1 ratio as a proxy is generous to the point of likely including some ISP-bound traffic. However, this 2:1 proxy is rather like a rebuttable presumption, allowing any carrier to demonstrate adduce evidence in negotiations, or ultimately arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy. Where disputes arise, however, the disputants are well advised to work the matters out between themselves, rather than bringing them to this forum after less-than-thorough negotiations.

local exchange carriers in terminating such traffic. These transactions are not, however, "local" within the meaning of Section 5.8 of the Bell Atlantic-MCI WorldCom interconnection agreement. During negotiations, the parties to this agreement may determine that adequate pricing and other terms for these transactions are already governed by other contract provisions (and, certainly, arguments along these lines have been advanced in the CLECs' comments; see Section III.B. *supra*). Or else, accepting or at least acquiescing in our view of Section 5.8 of the interconnection agreement, they may jointly conclude that the present agreement is silent on the point and needs to be supplemented to provide new terms for these mutual services. They are free to arrive at either judgment in coming to terms over the present dispute.[32] The best outcome is for Bell Atlantic and MCI WorldCom (or other CLECs where other interconnection agreements are concerned) to arrive at a resolution themselves. A far less satisfactory outcome is for the Department to have to interpret, or even to supply, terms, because the parties cannot agree. If the parties act wisely, it need not come to that, however. "Section 252 sets up a preference for negotiated interconnection agreements." *AT&T Corp.* v. *Iowa Utilities Board*, __ U.S. at __, 119 S.Ct. at 742 (Thomas, J., dissenting). Accordingly, we strongly advise potential complainants to follow this more promising and, in fact, statutorily preferred route *before* initiating any complaint based on "contractual principles or other legal or equitable considerations" with the Department. Moreover, it would be inefficient to have parallel complaint adjudications going on while mediation or arbitration is under way.

---

[32] See Internet Traffic Order, at ¶ 24 n. 77.

The FCC has tentatively concluded that "the inter-carrier compensation for this telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the 1996 Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts." Internet Traffic Order at ¶ 30. Although the FCC has not formally adopted this tentative conclusion, in the currently unresolved of inter-carrier compensation for ISP-bound traffic in Massachusetts (i.e., apart from 2:1 payments for the nonce), we expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish, insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic. If need be, we would be willing to provide a Department mediator to facilitate agreement, pursuant to the mediation provision of section 252(a)(2). If these negotiations do not resolve the present interconnection agreement dispute, the Department can arbitrate the matter under section 252(b). At that time, consistent with the discretion we have been given by the FCC (at least until the NPRM is settled), the Department would resolve whatever issues are put before it. But such formal process implies time, and time's value in business suggests that the parties would be better off themselves resolving the matters that divide them.

We note also that termination of the obligation for reciprocal compensation payments for ISP-bound traffic (because that traffic is no longer deemed local) removes the incentive for

CLECs to use their regulatory status "solely (or predominately)" to funnel traffic to ISPs. This development also removes the need for any further Department inquiry into the regulatory status of certain CLECs, the question raised by the October Order.

B. Competition and Efficient Entry

Having, then, assessed the effect of the FCC's declaratory ruling on our October Order, we turn to larger policy questions about the role of the Department in promoting *efficient* entry by new providers. The many comments filed in this case, asserting the importance of requiring reciprocal compensation for ISP-bound traffic to advance toward the policy goal of promoting competition in the local exchange, make clear that it is necessary for this Department to express to the negotiators its views on what competition really means.

Much futile debate in public utility regulation, especially in the current environment of developing markets, revolves around unexamined or sometimes distorted use of the terms 'competition' and its derivative 'competitive'. Loose, misleading, or self-serving meaning often underlies disputes and sows confusion.[33] It underlies this dispute as well.

---

[33] The frequent misuse and abuse of 'competition' and allied terms calls to mind the colloquy between Humpty Dumpty and Alice, when she objects to his arbitrary and idiosyncratic meanings for words:

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master--that's all."

Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (Boston: Lee

(continued...)

In so saying, we do not prejudge any formal renewal or prosecution of the dispute before us last October, where such a renewal might rest "on contractual principles or other legal or equitable considerations," as distinct from general policy arguments. But, as the parties and commenters in this docket will be negotiating, we believe it would be useful to highlight, in general terms, how the Department views underlying policy and economic issues. Otherwise, the parties must negotiate in a vacuum. In addition, certain of the interconnection agreements are coming due for renewal, e.g., MediaOne's agreement.

The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition.[34] A loophole, in a word. There is, however–and we emphasize this point–nothing sinister or even improper about taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprises like

---

33 (...continued)
and Shepard, 1st U.S. edition, 1872) chapter VI , p. 124.

34 See, e.g., the career accomplishment cited in Bell Atlantic Reply Comments on Motion for Modification, March 15, 1999, Attachment A, Resume of David F. Callan: "Identified niche opportunity related to asymmetrical traffic patterns under Federally mandated interconnection architecture." The premise of a mandate, of course, no longer holds *post* Internet Traffic Order.

CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited. Create an opportunity and inventive enterprise will seize upon it. It was ever thus. But regulatory policy, while it may applaud such displays of commercial energy, ought not create such loopholes or, once having recognized their effects, ought not leave them open.

Real competition is more than just shifting dollars from one person's pocket to another's. And it is even more than the mere act of some customers' choosing between contending carriers. Real competition is not an outcome in itself--it is a means to an end.[35] The "end" in this case is economic efficiency, which Baumol and Sidak have defined as "that

---

[35] As noted by Justice Breyer in *AT&T Corp.* v. *Iowa Utilities Board*, "[t]he competition that the [1996] Act seeks is a process, not an end result." *AT&T Corp.* v. *Iowa Utilities Board*, Opinion of Breyer, J., __ U.S. at __, 119 S.Ct. at 751. When the exercise of regulatory authority artificially brings into play additional providers but some one else in the market is "picking up the tab" for those new players' entry, that is not competition. It is, rather, handicapping one horse so the others in the field may as likely cross the finish first, despite their otherwise slower speed. There is no real gain in the efficient deployment of society's resources and thus no net social gain. While some may make the case for incubating infant industries, the purportedly temporary "life-support" measures entailed in doing so often become necessities (even entitlements) that cannot, practically speaking, later be withdrawn.

In the case of reciprocal compensation for ISP-bound traffic, "shifting dollars from one person's pocket to another's" occurs when Bell Atlantic's reciprocal compensation payments are in excess of a CLEC's costs to terminate ISP-bound traffic. (The discussion in the text *infra* makes clear that we believe this result likely obtains. See also note 34 *supra* and note 39 *infra*.) In addition, Bell Atlantic contends that the reciprocal compensation payments it has made are in excess of the costs that Bell Atlantic avoids by no longer terminating this traffic. Therefore, Bell Atlantic is making payments to CLECs for recovery of costs that are not being incurred and is paying more than its own avoided-cost savings. As a result, Bell Atlantic's shareholders or telephone customers are losing money, and CLECs are either earning additional profits or passing through these "savings" to their own customers as *putative* benefits of competition. Such benefits are not related to any efficiencies achieved or value added by CLECs. They are simply the result of regulatory distortion.

state of affairs in which, as the specialized literature of welfare economics recognizes, no opportunity to promote the general welfare has been neglected. Such an opportunity is defined as the availability of a course of action that will benefit at least some individuals, in their own estimation, *in a way not achieved at the expense of others*." Toward Competition in Local Telephony, at 24 (emphasis added).[36,37] Failure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society's resources is tantamount to countenancing and, to some degree, encouraging waste of those resources. Clearly, continuing to *require* payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare. It is an opportunity only to promote the welfare of

---

[36] See, also, Thomas J. Duesterberg and Kenneth Gordon, Competition and Deregulation in Telecommunications, p. 26 (1997), "Pricing policies and investment incentives for all parties, including the incumbents, must simultaneously be developed so as to create an efficient telecommunications system. Ideally, this means that prices of final goods and services, as well as of intermediate goods purchased by competitors, should reflect real economic costs."

[37] It is perhaps not fashionable to quote him in a regulated industry, but Adam Smith put the matter justly in 1776:

> No regulation of commerce can increase the quantity of industry in any society beyond what its capital can maintain. It can only divert a part of it into a direction into which it might not otherwise have gone; and it is by no means certain that this artificial direction is likely to be more advantageous to the society than that into which it would have gone of its own accord.
>
> Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society.

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford: University of Oxford, 1869), vol. I, bk. 4, ch. 2 (the chapter concerns restraints on imports, but the point is broadly suggestive in assessing proposed government actions).

certain CLECs, ISPs, and their customers, at the expense of Bell Atlantic's telephone customers and shareholders.

The Department has consistently rejected attempts over the years to make some customers and competitors better off at the expense of others, all in the name of promoting competition. For example, when the propriety of stranded cost recovery was being debated for the electric industry, the Department (with the sanction of the Supreme Judicial Court and of the General Court[38]) found that electric companies should have an opportunity to recover all of their prudently-incurred, non-mitigable stranded costs. This decision was (and still is) opposed by some on the claim that it purportedly reduces the benefits of competition; but the Department has rejected the notion that the mere shifting of costs to other customers or shareholders can be considered a "benefit" of competition. Similarly, in its recent decision in the natural gas unbundling docket, the Department stated:

> Our role is not to guarantee the success of entrants. Rather, our role is to put in place the structural conditions necessary for an efficient competitive process -- one where marketplace decisions of both producers and consumers are made on the basis of incremental costs. An efficient, unbundled gas industry framework would allow customers to compare the LDCs'[local distribution companies] incremental costs to marketers' incremental costs. However, this comparison cannot be made if historic cost commitments are imposed asymmetrically on the LDCs. In other words, if LDCs must include the inefficient costs of past commitments in their prices, while marketers are not required to include those costs for customers who choose to migrate, then marketplace decisions, at least in the near term, are being made on the basis of an asymmetric allocation of historic cost responsibility, not on the basis of incremental costs. This does not lead to efficient competition.

---

[38] The Supreme Judicial Court in *Massachusetts Institute of Technology* v. *Department of Public Utilities*, 425 Mass. 856, 866-67 (1997); and the General Court in St. 1997, c. 164.

Gas Unbundling, D.T.E. 98-32-B, at 30 (1999) (footnote omitted).

As the FCC has noted, reciprocal compensation payments for ISP-bound traffic are probably not cost-based. Internet Traffic Order at ¶ 29. The revenues generated by reciprocal compensation for that incoming traffic are most likely in excess of the cost of sending such traffic to ISPs.[39] ISP-bound traffic is almost entirely incoming, so it generates significant reciprocal compensation payments from Bell Atlantic to CLECs, an imbalance which enables CLECs to increase their profits or to offer attractive rates and services to Internet service providers–or to do both. Not surprisingly, ISPs view themselves as beneficiaries of this "competition" and argue fervently in favor of maintaining reciprocal compensation for ISP-bound traffic. However, the benefits gained, through this regulatory distortion, by CLECs,

---

[39] Similarly, ISG-Telecom Consultants, Int'l., a Florida industry consultant that specializes in helping ISPs turn into CLECs, has characterized the income derived from reciprocal compensation as "gravy" income. See Bell Atlantic Reply Comments, March 15, 1999, Attachment F (Affidavit of Paula L. Brown), Subattachment C to Attachment F (tenth unnumbered page), copy of Internet communication of ISG-Telecom, entitled "Taking the Plunge from ISP to ISP/CLEC. Is it Right for You???", copyright 1996, 1997, 1998, 1999:

> Although reciprocal compensation could be a new revenue source for the ISP/CLEC, we at ISG-Telecom NEVER recommend creating a business plan or business case model around reciprocal compensation. ISP/CLECs that choose to become CLECs to participate in reciprocal compensation should be aware of the current regulatory climate. Reciprocal compensation, in light of recent FCC considerations, should be considered "gravy" income ONLY [emphasis in original].

See also Internet Traffic Order, at ¶ 24 n. 78, wherein the FCC recognizes the question of consistency with the statutory scheme ("*e.g.*, definition of a carrier") of such "anomalous practices" as "free [I]nternet access while getting paid for it." In a word, "gravy."

ISPs, and their customers do not make society as a whole better off, because they come artificially at the expense of others.

Where an increase in income results from regulatory anomaly, rather than from greater competitive efficiency in the marketplace, a regulator is well advise to take his thumb off the scale. We do so today. Arguing that we should not correct the distortions created by reciprocal compensation payments because they benefit ISPs and their customers is much like saying that one should not encourage people to quit smoking, and so avoid adverse personal and public health consequences, merely because some members of society make a living growing tobacco. Decisions like this should be driven by concerns for overall societal welfare–and not by concern for preserving the hothouse environment of an artificial market niche.[40]

C. A Further Word about the Department's October Order

The foregoing analysis makes clear how the FCC's Internet Traffic Order affected MCI WorldCom, D.T.E. 97-116, but may raise the question of why, in the first place, we required Bell Atlantic last October to pay reciprocal compensation for ISP-bound traffic. We did so *not* because we felt that it was a good policy or that it promoted competition, *but* because we felt bound by the then-current state of decisional law, relying to a large degree on the FCC's own previous pronouncements to the effect that Internet calls represented two distinct services (particularly, the FCC's prior treatment of ESPs as discussed in Internet Traffic Order, at ¶

---

[40] See notes 34 and 39 *supra*.

5[41]). However, unease with the result did prompt the question of whether certain enterprises had nominally established themselves as CLECs "solely (or predominately)" to benefit from reciprocal compensation. That unease underlay the caution that the October Order would have to be reconsidered, were the FCC later to undercut its legal footing. In October, it appeared that the FCC's previous "two call" analysis was determinative of the issue. Then Internet Traffic Order clarified the FCC's earlier two-service analysis and fatally undercut our conclusion that ISP-bound traffic had to be deemed local under the interconnection agreement.

Some commenters have argued that Internet Traffic Order does not require us to modify our October decision. We disagree for the reasons already stated, but that it not the point. The real question for us is *not* whether the FCC's February decision *requires* us merely to modify our October decision, *but* whether we should cast about for some reason, any reason, to sustain that questionable result.[42] On the contrary, we view the FCC's decision as "liberating," in that it gives us the discretion to do what we would have liked to have been able to do back in October–namely, to get the parties to the interconnection agreement to set

---

41 See note 20 *supra*.

42 The situation is not without earlier parallel. The Department faced a similar choice and like counsel in 1994-95. The Department's policy regarding "environmental externalities" in electric regulation was overturned on purely legal grounds by the Supreme Judicial Court in *Massachusetts Electric Company* v. *Department of Public Utilities*, 419 Mass. 239, 243-50, 252 (1994) (imposing such externalities was "beyond the range of its statutory authority to do so"), the Department–barely a month after the Court had corrected it–flatly rejected counsel that it somehow cling to judicially discredited precedent. Boston Edison Company, D.P.U. 95-1-CC, at 12-14 (1995). We can be no less forthright here. A clean break with error is salutary.

rationally based, economic bounds on reciprocal compensation payments for ISP-bound traffic. The negotiations we have directed should be able to accomplish just that.

In conclusion, we observe that there have been calls for regulators to apply a battery of telecommunications regulatory requirements, including access charges, universal service levies, and service-territory obligations, to the Internet and ISPs. We do not agree with this approach. As noted by the FCC, the Internet has been successful beyond the wildest imagining--in large part because it has generally operated outside of a confining regulatory framework. Internet Traffic Order at ¶ 6.

However, the Internet should not benefit from CLECs' and ISPs' "gaming" regulation, either. Certain CLECs and ISPs have figured out a way to use reciprocal compensation--a regulatory requirement originally designed to promote local telephone exchange competition for all customers--as a revenue source for increased profits, lower Internet access costs, and maybe even improved Internet access. But someone else is "picking up the tab." In the near-term, that "someone else" appears to be Bell Atlantic. But *perhaps*[43], over the longer term, it could be Bell Atlantic's telephone customers under the price-cap regime, NYNEX Price-Cap

---

[43] We employ emphasis advisedly. Only where "regulatory, judicial, or legislative changes uniquely affecting the telecommunications industry" (and other stated cost changes) impose resultant additional cost can Bell Atlantic qualify for recovery under the exogenous cost adjustment provisions of its price cap mechanism. NYNEX Price-Cap Order, D.P.U. 94-50, at 181-83. Extra-statutory, voluntary contractual undertakings are another matter–and Bell Atlantic was and is free to choose such undertakings for its own business reasons, Internet Traffic Order at ¶ 24 n. 77. See, also, Complaint of A-R Cable Services, Inc., D.T.E. 98-52, at 5 n. 7; and see note 28 *supra*. Yet, negotiation or mediation may settle the question, and so it may not be presented for Department decision for arbitration.

Order, D.P.U. 94-50, at 181-83 (1995), if the Department were on its own to insist on imposing some other basis ISP-bound reciprocal compensation on the agreement and if that insistence amounted to an exogenous regulatory variable, imposed despite the FCC's jurisdictional declaration in Internet Traffic Order.

Perpetuating this regulatory distortion would not be rational: the Internet is powerful enough to stand on its own, without such effective subsidies. Ending this regulatory distortion would encourage *efficient* investment in Internet and other telecommunications technology. Efficient investment promotes real competition that benefits all customers. Few, if any, may have foreseen this potential for distortion when the 1996 Act became law. But the FCC's negation of the legal basis for MCI WorldCom, D.T.E. 98-116, requires that we review and correct, not willfully cling to, demonstrated error. It would be regrettable to forego an opportunity to bring about a rational economic result. As the parties to the instant and other interconnection agreements attempt to sort out their disputes, they need to consider the Department's policy disposition if it is ultimately called upon to supply the solution.

V. ORDER

After due consideration, it is hereby

ORDERED: That the Motion for Modification, filed by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts on March 2, 1999, is ALLOWED in that the Order of October 21, 1998 in MCI WorldCom Technologies, Inc., D.T.E. 97-116, is hereby VACATED; and it is

FURTHER ORDERED: That the Motion for Clarification, Reconsideration and Suspension of Escrow Order, filed by RNK, Inc. on March 31, 1999 (which incorporates by reference the Letter for Specific and Expeditious Relief, filed by RNK, Inc. on March 31, 1999) is DENIED; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts shall not be required, until further notice from the Department or until negotiations result in different payment terms, to escrow any reciprocal compensation payments for Internet-bound traffic or be required to maintain the present escrow arrangement; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts shall not be required to make reciprocal compensation payments, in excess of a 2:1 terminating-to-originating traffic ratio, beginning with any payments made or to be made after (and including payments undisbursed as of) February 26, 1999.

By Order of the Department,

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

A true copy
Attest:
MARY L. COTTRELL
Secretary

Pursuant to § 252(e)(6) of the Telecommunications Act of 1996, appeal of this final Order may be taken to the federal District Court or the Federal Communications Commission. Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made, or in the absence of such, within 20 days of the date of this Order.

CONCURRING AND DISSENTING OPINION OF JANET GAIL BESSER, CHAIR AND EUGENE J. SULLIVAN, JR., COMMISSIONER

I. INTRODUCTION

Although we agree that the FCC's Internet Traffic Order invalidated the factual two-call premise of the Department's October Order, we disagree with the majority's conclusion that this invalidation automatically serves to relieve Bell Atlantic from any and all obligations to pay compensation for ISP-bound traffic terminated by CLECs. D.T.E. 97-116-C at 25, 40. For the reasons stated below, we believe that the Department should determine whether existing interconnection agreements require the parties to pay reciprocal compensation for this traffic. In addition, we would have required Bell Atlantic to continue to escrow the disputed payments while this matter is determined. Finally, we would strongly encourage the disputants to negotiate new commercial arrangements regarding this traffic. Accordingly, we concur in part, and dissent in part from the majority's decision.

II. DISCUSSION

A. The Department's October Order

The Department's October Order explicitly and clearly limited the basis for its conclusion that calls terminated by CLECs to ISPs qualified for reciprocal compensation by determining only that such calls were "local." MCI WorldCom at 6. Although the parties in that proceeding raised numerous issues, including various substantive policy and economic reasons for paying reciprocal compensation, the Department never explored these issues through hearings and discovery. Id. The October Order made no findings with respect to any other bases for reciprocal compensation nor did that Order specifically claim that other bases

did not exist. Id. Rather, the October Order clearly determined, relying solely on a two-call analysis,[1] that ISP-bound traffic constitutes "local" traffic thus "qualifying it for reciprocal compensation." Id. at 12-13.

B. The Effect of the Internet Traffic Order on the Department's October Order

On February 26, 1999, the FCC determined that ISP-bound traffic was considered interstate based on a one-call analysis. Internet Traffic Order at ¶¶ 1,3. We agree with the majority that this decision removes the basis we used to support our conclusions in the October Order. However, we disagree with the majority's view of the immediate consequences of the Internet Traffic Order for our October Order. Without the local call basis, and without deciding the validity of any other potential bases, the majority concludes that Bell Atlantic is no longer obligated to pay reciprocal compensation for ISP-bound traffic. D.T.E. 97-116-C at 25, 40.

The conclusion that Bell Atlantic is no longer obligated to pay reciprocal compensation ignores the fact that Bell Atlantic had been paying reciprocal compensation well before issuance of the October Order. MCI WorldCom at 1-2, n.6. Thus, if our October Order is in

---

[1] We note this was not, contrary to the majority's assertion, a "mistake of law." D.T.E. 97-116-C at 24. In fact, the FCC had, on May 7, 1997, noted that "[w]hen a subscriber obtains a connection to an [ISP] via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP's] service offering." In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, at ¶ 789, Report and Order (rel. May 7, 1997); see also Internet Traffic Order at ¶¶ 13-16. Accordingly, our October Order was consistent with existing law, subsequently changed, and was not a mistake of law.

fact a "nullity"[2] as the majority states, D.T.E. 97-116-C at 24, then the logical conclusion would be that Bell Atlantic should revert back to paying full reciprocal compensation pursuant to its interconnection agreement until such time as the Department determines whether other legitimate sources of support for this obligation exist.[3] Internet Traffic Order at ¶ 24.

Moreover, we do not find anything in the Internet Traffic Order that supports the conclusion that MCI WorldCom should be vacated. D.T.E. 97-116-C at 40. We do not agree that the MCI WorldCom Order no longer gives rise to any rights or obligations; rather, we believe that the MCI WorldCom Order was valid at the very least until issuance of the Internet Traffic Order.[4] We therefore disagree with the majority's decision that Bell Atlantic is not required to pay funds due before issuance of the Internet Traffic Order. D.T.E. 97-116-C at 28 n. 30.

Finally, we also strongly disagree with the majority's suggestion that the Internet Traffic Order may have eliminated any and all obligations for Bell Atlantic ever to have paid any reciprocal compensation for ISP-bound traffic. While we may agree that Bell Atlantic's

---

2 Black's Law Dictionary (6th ed. 1991) defines the phrase "null and void" as meaning "that which binds no one or is incapable of giving rise to any rights or obligations under any circumstances . . . ."

3 We view this dispute as remaining active; in our view, MCI WorldCom need not re-file its complaint in order to re-invigorate this suit. Cf. D.T.E. 97-116-C at 25. However, we believe it would be a more efficient use of resources for the Department to re-notice these issues for resolution in the context of a generic adjudication applicable to all relevant interconnection agreements.

4 This has implications, for example, for RNK, which sought funds owing before issuance of the Internet Traffic Order (RNK Letter for Specific and Expeditious Relief dated March 31, 1999).

obligation to pay reciprocal compensation for this traffic was called into question on February 26, 1999, that ruling merely changed the state of the law from that date forward. Reciprocal compensation paid from Bell Atlantic to the CLECs before that date was made pursuant to valid, legal obligations, consistent with state policy, and we disagree with any intimations to the contrary by the majority.

The Internet Traffic Order requires the Department to resume the investigation we thought we had concluded in October 1998. The FCC recognized that this might be the case for a number of state commissions, stating that it

> recognize[s] that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to *re-examine their conclusion* that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking . . . . (emphasis added).

Internet Traffic Order at ¶ 27.

The majority views the authority granted to state commissions in ¶ 27 as "vague" and "equivocal." D.T.E. 97-116-C at 24. However, we believe that this interpretation is not warranted. First, we have statutory obligations to fully investigate and adjudicate disputes subject to our jurisdiction. G.L. c. 30A; see also G.L. c. 159, §§ 12(d), 16, 19, 20. We should not prejudge whether arguments yet to be put forth by litigants have or lack merit without the benefit of a complete record developed with the fundamental due process rights of cross-examination and rebuttal. Second, the majority chooses to read ¶ 27 in light of Commissioner Michael K. Powell's concurrence. However, a concurring opinion (or, we

acknowledge, a dissenting one for that matter) does not make the law. Consequently, we would accept the FCC's majority view and the authority it grants to state commissions as controlling until lawfully set aside, either by a reviewing court or a subsequent FCC decision. We note the difference between a suggestion that we "might" want to or need to "re-examine" our earlier conclusion, and an order from the FCC or other appellate body vacating, nullifying, remanding, or overruling our MCI WorldCom decision. Furthermore, we are buttressed in our view that ¶ 27 contains more than "a consoling notion," D.T.E. 97-116-C at 24, by the fact that, of the eleven state commissions that have considered the reciprocal compensation issue since the Internet Traffic Order, none have found that it is dispositive of this issue nor have any determined that LECs' existing obligations to pay reciprocal compensation should be changed.[5]

---

[5] WorldCom, Inc. v. GTE Northwest Inc., "Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim," Washington Utilities and Transportation Commission, Docket No. UT-980338 (May 12, 1999) (Commission found no reason to alter prior decision in MFS/US West Arbitration, and that prior finding that calls to ISPs are local calls subject to reciprocal compensation should apply to MFS/GTE agreement as well); In the Matter of the Application of Global NAPs South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc., Delaware Public Service Commission, Docket No. 98-540, Order No. 5092 (May 11, 1999) (Commission affirmed arbitrator's award that found interconnection agreement adopted by Global NAPS *did* anticipate treating ISP-bound traffic as local for purposes of reciprocal compensation, because agreement did not contain provisions for segregation of ISP-bound traffic or other special procedures for such traffic; arbitrator also found that FCC Order not dispositive of issue and that GNAPS entitled to receive reciprocal compensation for ISP-bound calls unless and until FCC issues ruling to contrary); In the Matter of the Petition of GTE Hawaiian Telephone Company, Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation, Hawaii Public

(continued...)

[5] (...continued)
Utilities Commission, Docket No. 99-0067, Decision and Order No. 16975 (May 6, 1999) (Commission found that previous finding that reciprocal compensation should be paid for Internet traffic not in conflict with FCC Order); In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom v. Ameritech Ohio, Ohio Public Utilities Commission, Case No. 97-1557-TP-CSS et al (May 5, 1999) (Commission found that FCC Order does not affect earlier decision and that pending new FCC rule, state commissions have authority to establish inter-carrier mechanism and to decide whether and under what circumstances reciprocal compensation is due); Electric Lightwave, Inc. v. U S WEST Communications, Inc., Oregon Public Utility Commission, Order No. 99-285 (April 26, 1999) (Commission ruled that ISP traffic is local under terms of existing interconnection agreements, agreeing with the Alabama PSC that parties were required to specifically exclude ISP traffic from the definition of local traffic or applicability of reciprocal compensation, if that was parties' intent); Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, "Order Instituting Proceeding to Reexamine Reciprocal Compensation," New York Public Service Commission, Case No. 99-C-0529 (April 15, 1999) (Commission opened new docket to reexamine reciprocal compensation policy, particularly costs and rate structures applicable to large-volume call termination to single customers, and to set permanent rates for such by August, 1999; Commission noted that FCC order allows states to continue requiring payment of reciprocal compensation for Internet-bound traffic); In Re Petition of Pac-West Telecomm, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell, "Order Adopting Revised Arbitration Decision," Nevada Public Utilities Commission, Docket Nos. 98-10015 and 99-1007 (April 12, 1999) (Commission found FCC Order does not alter fact that ISP-bound traffic is treated as local for rate-making purposes and that ISPs are no different than other local business customers; Commission noted there is no practical way of distinguishing ISP-bound traffic and fact that there is substantial imbalance between calls terminating to CLEC does not support conclusion that subsidy flow exists); In Re: Request for Arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. v. BellSouth Telecommunications, Inc. regarding Traffic Terminated to Internet Service Providers, Florida Public Service Commission, Docket No. 981008-TP, Order No. PSC-99-0658-FOF-TP (April 6, 1999) (Commission required continued payment of reciprocal compensation for Internet-bound traffic; Commission found it did not need to address jurisdictional nature of calls but only needed to examine parties' intent, which clearly showed intention that Internet-bound

(continued...)

C. The Effect of the Internet Traffic Order on the Escrow Order

Our reasoning with respect to Bell Atlantic's reciprocal compensation obligations in the wake of the Internet Traffic Order does not lead us to conclude that we ought to require Bell Atlantic to pay reciprocal compensation for ISP-bound traffic to the CLECs during the completion of this proceeding or for the pendency of a new one. Although we agree that the FCC now has final jurisdiction to regulate and establish a compensation mechanism for this traffic, the FCC recognized that it has no regulations currently in place concerning these issues

---

5 (...continued)
traffic be rated and billed as local calls); In the Matter of the Petition of Pacific Bell for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. pursuant to Section 256(b) of the Telecommunications Act of 1996, "Order on Draft Arbitrator's Report," California Public Utilities Commission, Application 98-11-024 (March 30, 1999) (in context of arbitration of new interconnection agreement, Arbitrator found that Pacific Bell is required to pay reciprocal compensation for ISP-bound traffic, concluding that such compensation was not eliminated by FCC Order); In Re: Emergency Petitions of ICG Telecom Group, Inc. and ITC Deltacom Communications, Inc. for a Declaratory Ruling, Alabama Public Service Commission, Docket No. 26619 (March 4, 1999) ("Commission found ILECs should pay reciprocal compensation for ISP traffic under terms of interconnection agreements; Commission also found that parties intended those calls to be local because they did not exclude ISP traffic from local traffic at time agreements entered into); In the Matter of Enforcement of Interconnection Agreement between Intermedia Communications, Inc. and BellSouth Telecommunications, Inc., "Order Denying Motion for Stay," North Carolina Utilities Commission, Docket No. P-55, SUB 1096 (March 1, 1999) (Commission denies further stay for BellSouth of its November 4, 1999 order requiring payment of reciprocal compensation for ISP traffic; Commission found that any further stay must be obtained from court on appeal; in comments to district court, Commission argues that FCC Order does not disturb Commission's earlier order).

and issued an NPRM to rectify the situation. Internet Traffic Order at ¶¶ 1, 9, 21; NPRM at ¶¶ 28-36. However, for the interim period, the FCC made it clear that states could continue to determine how compensation for this traffic should be structured. While the Internet Traffic Order grants broad discretion over this compensation issue to the states for this interim period, this discretion is not unlimited. Thus, while it may be appropriate for a state to continue reciprocal compensation for contractual, policy or equitable considerations, or to develop and implement some other inter-carrier compensation mechanism, we have difficulty interpreting the FCC's order as authorizing a rate of "zero"[6] for this traffic, for the following two reasons. First, the Act requires local exchange carriers to compensate each other for the transport and termination of traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). Second, a carrier's transport and termination of this traffic has some non-zero associated costs, as the majority acknowledges.[7] D.T.E. 97-116-C at 28-29. Thus, we believe that inter-carrier compensation

---

6 We note that Bell Atlantic has voluntarily offered, and the majority has accepted, to continue paying reciprocal compensation for traffic up to an imbalance of 2:1. The majority notes that because there is no technological means to segregate legitimate local traffic from illegitimate ISP-bound traffic, this ratio "is generous to the point of likely including some ISP-bound traffic." D.T.E. 97-116-C at 28 n.31. However, according to the majority, there is no legal requirement that Bell Atlantic pay any reciprocal compensation to one another for this traffic; accordingly, the effective legal "rate" is zero. Id. at 25.

7 The majority's reference to a possible impact on Bell Atlantic's ratepayers (via a price cap exogenous cost) if Bell Atlantic was ordered to continue paying reciprocal compensation is premature and speculative at best. Whether Bell Atlantic would be eligible for such exogenous cost recovery is dependent on a number of complex factors which we would not presume to prejudge.

is due but recognize that the ultimate level of this compensation remains to be determined. Accordingly, we would have continued escrow in recognition of the legitimate dispute regarding these funds and to preserve them for immediate payment upon final decision or settlement. Accord D.T.E. 97-116-B (authorizing Bell Atlantic to escrow certain reciprocal compensation payments because escrow constitutes an accepted method to preserve disputed payments during a commercial dispute, and because various interconnection agreements require escrow of funds in the event of a dispute).

D. Discussion Concerning Negotiation and Settlement of this Dispute

While we agree with the majority that a negotiated settlement is the ideal outcome, we have concerns about the process that it would use to reach such a resolution. The process the majority articulates lacks any meaningful incentives for the parties to reach a settlement for two reasons. First, the elimination of Bell Atlantic's obligation to pay reciprocal compensation into escrow for ISP-bound traffic provides a sure recipe for delay and non-settlement because Bell Atlantic now has little incentive to negotiate[8] and the CLECs have reduced leverage. Second, without an active adjudication proceeding concurrent with the negotiation/mediation/arbitration process established by § 252 of the 1996 Act, no route exists for the Department to end the dispute by issuing a final order.

---

[8] Given its conclusion that Bell Atlantic has no obligation to pay reciprocal compensation for ISP-bound traffic, it is not clear to us why the majority thinks Bell Atlantic would engage in negotiation, as it encourages Bell Atlantic to do, because if such discussions were to lead to an agreement for compensation, then Bell Atlantic would begin to pay its local competitors for traffic that, according to the majority, it has no obligation to pay.

E. Competition and Efficient Entry

Finally, we respond to the majority's colloquy on competition and efficient entry. In our view, this discussion is not directly related to the dispute before the Department in the instant proceeding. The substance of the discussion was not addressed directly by the parties or by the Commission as a whole in our deliberations. Therefore, we do not consider it to be a useful or appropriate addition to the Order.[9]

The majority does attempt to make a connection between the discussion in Section IV.B. and the issue of payment of reciprocal compensation for ISP-bound traffic, for example on page 32 where it states, "we do not prejudge any potential renewal of the dispute before us last October, where such a renewal might rest 'on contractual principles or other legal or equitable considerations' and not on substantive policy or economic issues." The majority appears to make this statement because it has reached a conclusion on the substantive policy and economic issues, to borrow its words, "in a vacuum."[10] In fact, one can infer from this

---

9 We note that the Department occasionally provides general guidance at the close of an order on a specific adjudication, but the guidance is directly related to the substance of the order. For example, in Essex County Gas Company, D.T.E. 98-27 (1998), the Department included direction on the showing proponents of a merger should make to ensure expeditious consideration of their petitions. This type of guidance, directly related to the specific case at hand and flowing from the evidence presented, is, of course, appropriate.

10 The majority concludes, "Clearly, continuing to require payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare" without the Department having examined this question. D.T.E. 97-116-C at 34.

conclusion that the majority has determined that there is no other basis for paying reciprocal compensation without consideration of evidence or argument.

Not only did the Department's October Order not reach the question whether there were bases for payment of reciprocal compensation other than the "local call" basis on which we relied then, but we also did not address any of the substantive policy or economic issues that, as a public utilities commission charged with protecting the public interest, it is our job to address. Doing our job – that is, taking evidence and hearing argument before reaching a reasoned decision – is not "cast[ing] about for . . . any reason to sustain [a] questionable result." Id. at 38. Rather, it is doing the work necessary to determine whether a result is, in fact, questionable or not questionable. As we have already indicated, continuing the current proceeding or opening a new one to address whether there are other bases – including consideration of substantive policy or economic issues - for payment of reciprocal compensation for ISP-bound traffic should be the Department's next step in resolving the current dispute.

Janet Gail Besser, Chair

Eugene J. Sullivan, Jr., Commissioner

SEPARATE STATEMENT OF JANET GAIL BESSER, CHAIR

In addition, while I question the value of including general pronouncements in an order such as this, I cannot let what I see as the majority's incomplete or inaccurate characterization of the Department's policy on competition go unaddressed. When the majority quotes from a previous Department order on the subject, I obviously take no issue with its restatement of Department policy. The Department's deliberations in Gas Unbundling, D.T.E. 98-32-B (1999), centered on the prerequisites and regulatory framework for promoting competition in the gas industry. The passage quoted by the majority on the role of entrants was part of a larger discussion of what constitutes full and fair competition -- an oft-stated goal of the Department in the context of both electric industry restructuring, Electric Restructuring, D.P.U. 95-30 (1995) and Electric Industry Restructuring, D.P.U. 96-100 (1997) and gas unbundling, D.T.E. 98-32-B at 4. There are also other individual statements in this section with which I agree.

However, I am concerned that the overall tone of the discussion does not capture the Department's policy on competition and efficient entry. In the current context, the passage from Gas Unbundling appears to be used to bolster criticism of new entrants for pursuing their own self-interest, despite the majority's assertions to the contrary.[11] The majority's narrow focus on the actions of new entrants here does not do justice to the Department's policy on

---

[11] See, e.g., D.T.E. 97-116-C at 32-33 ("There is, however - and we emphasize this point - nothing illegal or improper in taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprise[s] like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited.").

competition, a broad and comprehensive policy that we have spent much of our time developing over the last several years to enable the utility industries to make the transition from traditional regulation to competitive markets and to open these markets to new entrants who will bring with them innovation and pressures for efficient operation. In my view, the Department's policy on competition is best and most succinctly captured in the principles we articulated in 1995 to guide the restructuring of the electric industry, D.P.U. 95-30, and used again in 1997 to lead off the Department's gas unbundling initiative. Department Letter to Gas Local Distribution Companies, D.T.E. 98-32 (July 18, 1997). In this Order, I fear that the majority has fallen into the trap it identified of the "[l]oose, misleading, or self-serving usage [that] often underlies disputes and sows confusion." D.T.E. 97-116-C at 31. Therefore, I must respectfully disagree with its overall characterization of Department policy on competition and efficient entry.

Janet Gail Besser, Chair